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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES COLYAR,

Defendant and Appellant.

H041325

(Santa Clara County

Super. Ct. No. 179154)

Appellant James Colyar seeks review of an order extending his involuntary commitment to a state hospital under Penal Code section 1026.5, subdivision (b).<sup>1</sup> He contends that he was deprived of his constitutional and statutory rights because the trial court failed to advise him of his right to a jury trial and obtain a personal waiver of that right before conducting a bench trial on the People's recommitment petition. We agree that error occurred and therefore reverse the order.

*Background*

On December 19, 1996, appellant pleaded not guilty by reason of insanity (NGI) to a felony violation of section 422 (threats to commit a crime resulting in death or great bodily injury), and a misdemeanor violation of section 245, subdivision (a)(1) (assault by means of force likely to produce great bodily injury). On February 21, 1997, appellant was committed to a state hospital for a maximum term of four years pursuant to

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<sup>1</sup> All further statutory references are to the Penal Code.

section 1026. That commitment was extended multiple times over the next 17 years, pursuant to section 1026.5, subdivision (b).

The last petition to extend appellant's commitment was filed on May 14, 2014. On June 20, 2014, the district attorney and defense counsel appeared in court on the petition, and the following discussion took place: "MR. SHARKEY: Thompson Sharkey on behalf of Mr. Colyar. He's not present, I'll waive his appearance. [¶] THE COURT: All right. Pursuant to our discussions in chambers, Mr. Colyar's requesting a trial. It's my understanding he's going to waive jury? [¶] MR. SHARKEY: That's correct. I talked with Mr. Colyar yesterday. He's at Napa State Hospital. He told me he would like to waive his right to jury trial in this matter. [¶] THE COURT: People also waive? [¶] MS. TRACEY [district attorney]: Yes. [¶] THE COURT: All right. Then the matter will be continued to July 18 you [sic], that will be for receipt of records and for trial setting." The court confirmed appellant's jury waiver on July 18, 2014, in a proceeding on the People's motion for release of records pending the continued hearing.

Trial on the latest petition took place on July 29, 2014, via closed-circuit video. The court found the allegations of the petition to be true beyond a reasonable doubt and accordingly ordered that appellant be recommitted to the state hospital for two more years, until January 31, 2017. Appellant then filed this timely appeal.

### *Discussion*

Section 1026.5, subdivision (b)(3), provides in part: "When the petition [for extended commitment] is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial." Section 1026.5, subdivision (b)(4), states in pertinent part: "The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney."

In this case, the trial court accepted defense counsel's representation that appellant wished to waive his right to a jury trial on the People's petition. Recently, however, our

Supreme Court held that subdivisions (b)(3) and (b)(4) of section 1026.5 require the trial court to “advise the NGI defendant personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the defendant unless the court finds substantial evidence that the defendant lacks the capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision.” (*People v. Tran* (2015) 61 Cal.4th 1160, 1163 (*Tran*).) The court further held that the failure to obtain the defendant’s personal waiver without an explicit finding of lack of capacity could not be deemed harmless error and compels reversal, unless “the record affirmatively shows that there was substantial evidence that the defendant lacked that capacity [to make a knowing and voluntary personal waiver] at the time of defense counsel’s waiver.” (*Id.* at p. 1170.)

Here, the court’s acceptance of defense counsel’s waiver on behalf of appellant contravened section 1026.5, subdivisions (b)(3) and (b)(4). The People concede that the failure to advise appellant and obtain a personal waiver of his statutory right to a jury trial was error under *Tran*. They further acknowledge that the record contains no finding that appellant lacked the capacity to make a knowing and voluntary waiver of that right, and we may not presume so on a silent record.<sup>2</sup> (Cf. *People v. Blackburn* (2015) 61 Cal.4th 1113, 1136.) We must therefore reverse the order and remand for the court to comply with *Tran*’s requirement of an on-the-record advisement and personal waiver of appellant’s right to a jury trial on the petition.

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<sup>2</sup> The People do suggest that the record “demonstrates, by substantial evidence, that appellant lacked capacity to make a knowing and voluntary waiver.” They cite no such evidence. To the contrary, defense counsel’s statement to the court indicates that he did not himself consider appellant to lack the capacity to decide whether to have a jury or court trial: “I talked with Mr. Colyar yesterday. He’s at Napa State Hospital. He told me he would like to waive his right to jury trial in this matter.”

*Disposition*

The order is reversed and the matter is remanded for a hearing and disposition that comply with *Tran*.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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GROVER, J.